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IN THE

Supreme Court of the United States

No. 70-5009

THEON JACKSON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Supreme Court of Indiana, affirming the judgment of the Marion Criminal Court, Division I, committing the Petitioner, Theon Jackson, to the Indiana Division of Mental Health to be confined until such time that the Division of Mental Health shall certify to said Court that the Petitioner is sane, is reported at 255 N.E. 2d 515, with dissenting opinion reported at 255 N.E. 2d 518; the said judgment of commitment appearing in the Appendix

in this cause at p. 10, the majority opinion of the Supreme Court of Indiana appearing in said Appendix at p. 23, and the dissenting opinion of DeBruler, J. appearing in said Appendix at p. 29.

Upon Petition for Rehearing duly filed the Supreme Court of Indiana denied the same without opinion, (A. p. 31), with two Justices dissenting: Jackson and DeBruler, JJ.

JURISDICTION

The Supreme Court of Indiana entered its opinion affirming said Judgment of commitment on February 19, 1970. Petitioner's Petition For Rehearing was thereafter duly filed on March 11, 1970, denied on May 14, 1970, without opinion, and Petition For Writ Of Certiorari duly filed thereafter with the Clerk of this Court on August 11, 1970.

Thereafter on March 22, 1971, this Court granted Petitioner's motion for leave to proceed in *forma pauperis* and said Petition For Writ of Certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Eighth and Fourteenth Amendments of the Constitution of the United States of America, to-wit:

EIGHTH AMENDMENT:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

FOURTEENTH AMENDMENT:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due proc-

ess of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The applicable provision of the Constitution of the State of Indiana is Article 1, Section 12, to-wit:

> "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."

The Indiana statutes involved in this cause and the questions presented are as follows:

The judgment of the trial court was based upon the Acts of the General Assembly of Indiana, 1951, Ch. 238, Sec. 2, as amended, and as found in Burns Ind. Stat. Ann., 1956 Repl., (1969 Supp.), Sec. 9-1706a. Under subsequent legislation this statute is now contained in Indiana Code of 1971, Title 35, Article 5, Chapter 3, Section 2:

> "When at any time before the trial of any criminal cause * * *the court, either from his own knowledge or upon the suggestion of any person, has reasonable ground for believing the defendant to be insane, he shall immediately fix a time for a hearing to determine the question of the defendant's sanity and shall appoint two (2) competent disinterested physicians who shall examine the defendant upon the question of his sanity and testify concerning the same at the hearing. At the hearing other evidence may be introduced to prove the defendant's sanity or insanity. If the Court shall find that the defend- has comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense, the trial shall not be delayed or continued on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make

his defense, the trial shall be delay or continued on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the court shall order the defendant committed to the department of mental health, to be confined by the department in an appropriate psychiatric institution. Whenever the defendant shall become sane the superintendent of the state psychiatric hospital shall certify the fact to the proper court, who shall enter an order on his record directing the sheriff to return the defendant, or the court may enter such order in the first instance whenever he shall be sufficiently advised of the defendant's restoration to sanity. Upon the return to court of any defendant so committed he or she shall then be placed upon trial for the criminal offense the same as if no delay or postponement had occurred by reason of defendant's insanity."

The applicable statutes for the commitment and discharge of feebleminded persons are as follows:

Acts of the General Assembly of Indiana, 1939, Ch. 119, Sec. 3, as found in Burns Ind. Stat. Ann., 1964 Repl., Sec. 22-1907; presently contained in I.C. 1971, 16-15-1-3

"A reputable citizen of the county from which an application is to be made shall make an application * * * setting forth information substantially as follows: * * * the cause and duration of the feebleminded condition * * * together with a certificate of a reputable physician that the applicant is admissible under the rules of the board of trustees, that he or she is feeble-minded and *is not insane* * * *." (emphasis added)

Acts of the General Assembly of Indiana, 1919, Ch. 94, Sec. 18, as found in Burns Ind. Stat. Ann., 1964 Repl., Sec. 22-1814; presently contained in I.C. 1971, 16-15-4-12

"Any person may be discharged from the colony at any time by the board of trustees (commissioner of mental health), provided only that no person shall be discharged from the said colony until, in the judgment of the superintendent, the mental and physical condition of the patient justifies it."

Acts of the General Assembly of Indiana, 1931, Ch. 38, Sec. 1, as amended, and as found in Burns Ind. Stat. Ann., 1964 Repl., Sec. 22-1901; presently contained in I.C. 1971, 16-15-3-1

"The name of the Indiana School for Feeble-Minded Youth is hereby changed to the Fort Wayne State Hospital and Training Center; and the name of the Muscatatuck Colony, shall be known as the 'Muscatatuck State Hospital and Training Center,' which name shall apply to all statutes where the name of Muscatatuck Colony, or Muscatatuck State School is now used."

Acts of 1939, Ch. 119, Sec. 4, as found in Burns, Ind. Stat. Ann., 1964 Repl., Sec. 22-1908; presently contained in I.C. 1971, 16-15-1-4

"The respective board of trustees (commissioner of mental health) of each of said institutions is empowered to make such rules and regulations respecting the care, custody * * * of patients, and the management of such institution and its affairs, as it may deem best for the interest of the patients and the state. * * * All persons admitted to such institution shall, until properly discharged from the same, be under the custody and control of the superintendent thereof, and such superintendent, subject to such regulations as the trustees (commissioner) see fit to adopt, may restrain and discipline any patient in such manner as he may judge is demanded for the welfare of the patient and the proper conduct of the institution. Furloughs and discharges may be given to the patients as provided by such regulations."

Acts of 1947, Ch. 93, Sec. 1, as found in Burns Ind. Stat. Ann., 1964 Repl., Sec. 22-1910; presently contained in I.C. 1971, 16-15-2-1

"No person who has ever been adjudged feeble-minded according to law and has been formally discharged from either of the state schools for feeble-minded, shall again be admitted to any such school unless and until a sworn statement is filed, with the cuit court of the county in which such discharged inmate resides, by a reputable physician who is licensed to practice medicine in this state, declaring that such physician is acquainted with such inmate and that such inmate was formerly adjudged feeble-minded; that such inmate has legal residence in Indiana; that such inmate * * * *is still feeble-minded, not insane,* * * * and a proper subject for conveyance and admission to said state school. * * * Such statement shall be filed and kept with the clerk of such court and a transcript thereof certified by him shall be under the seal of the circuit court, shall be transmitted to the proper school for the feeble-minded * * * and shall serve as an application for readmission and be acted upon by the authorities of the state school in the same manner as they act upon any request for admission. * * *"

(emphasis added)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Indiana Courts violated the dictates of the Eighth Amendment of the Constitution of the United States by ordering the confinement of the Petitioner, a feeble-minded deaf mute, until he has "become sane" as a commitment under a criminal charge (two charges, with joint sanity hearing) as distinguished from a civil commitment, such confinement amounting to a life sentence resulting from the lodging of the criminal charges, without trial thereof, constituting cruel and unusual punishment.

2. Whether the Indiana Courts violated the dictates of the Fourteenth Amendment of the Constitution of the United States by applying a statute concerning the insane,

ordering the confinement of the Petitioner, a feeble-minded deaf mute, until he has "become sane", confining him for little solely because he has been *charged* with a crime(s) for which he has not and will not be tried, (and as to which charges there have not even been any judicial determinations made that the incidents occurred, in respect to probable cause), and which he was incapable of committing, as crimes.

STATEMENT OF THE CASE

The Petitioner was charged in Indianapolis, Marion County, Indiana, with the criminal offense of robbery, in two (2) separate causes, by affidavits. The first charge, filed May 6, 1968, (A. pp. 1-2) charged the petitioner with having committed a robbery on July 28, 1967, (A. p. 1), and the second affidavit, filed May 6, 1968, (A. pp. 2, 3) charged the Petitioner with having committed a robbery on July 22, 1967. (A. p. 3) In each case the Petitioner waived arraignment and entered a plea of "not guilty", (A. pp. 2, 3) and on September 13, 1968, the counsel for Petitioner, stating that he had been unable to communicate with the Petitioner with respect to the question of jury waiver, requested that the causes be set on the Jury docket. (A. p. 5)

Thereafter on October 23, 1968, the court made an entry and order in both cases, stating that: (A. p. 6)

> "Court being duly advised that defendant might lack Comprehension Sufficient to Understand the Nature of Charges against him and to Aid his counsel in his own defense. Court now appoints Dr. Nie and Dr. Schuster to examine the defendant as to same."

n the joint report of the appointed doctors filed Nov. 12, 968, observing that Petitioner does not hear and does not ommunicate except through sign language and some pantoine, that further stated that Petitioner

> "* * * is mentally defective and coupled with his severe hearing loss and communication loss that he can neither understand the nature of the charge against

him nor can he adequately participate in preparing his own defense."

(A. pp. 6, 7)

On December 18, 1968, the trial court held a hearing in respect to Petitioner, as defendant in both said cases, concerning his mental condition, (A. p. 7) and on December 26, 1968, found that:

"* * * defendant lacks comprehension sufficient to make his defense"

and entered the following order:

(A. p. 7)

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the defendant Theon Jackson be and hereby is committed to the Indiana Division of Mental Health to be confined until such time that the Division of Mental Health shall certify to this Court that the defendant is sane."

At the hearing Dr. Dwight Schuster testified that the Petitioner is a deaf mute, mentally defective, could only understand a very limited number of deaf mute signs, does not understand the nature of the charges against him and cannot comprehend sufficiently to make his defense. (A. pp. 13-14) As to a "cure" of Petitioner's condition, it would consist of his learning the deaf mute sign language if he is capable of so doing, but the Doctor stated that he questioned how much ability the Petitioner has, and then stated that therefore the prognosis appears rather dim—that he didn't think he (and a Mr. Olson, deaf mute interpreter) ever got through to the Petitioner—that Petitioner is insane if that means unable to comprehend the nature of the charges and to assist his attorney in his defense—that he, the Doctor, does not believe his, the Petitioner's, "sanity" could be restored after commitment to the State Department of Mental Health—and that the mental defect of the Petitoner is what is sometimes referred to in the law as feebleminded-ness, mental retardation, the mental level of the Petitioner being a pre-school level. (A. pp. 14-15)

The other appointed Doctor, Dr. Louis W. Nie, testified that even if the Petitioner were not a deaf mute, he would still lack the necessary comprehension, and that he, the Doctor, doubted that the basic intelligence of the Petitioner, even if he could develop communication, would enable him to communicate effectively and to participate in a knowing, understandable way in his defense. (A. pp. 15-16)

The interpretor who worked with the Doctors, John Olson, a supervising teacher of the High School Department of the School For The Deaf (Indiana), testified that the level of mental comprehension of the Petitioner is about a three (3) or four (4) year old deaf child—that there isn't anything in the State of Indiana in the nature of facilities which could, after a length of time, aid the Petitioner to understand the nature of the charges and assist in the defense. (A. p. 18-21)

The counsel for Petitioner duly filed a motion for new trial in both cases, contending therein that the decision of the court is not sustained by sufficient evidence and is contrary to law, and pointing out that there was no evidence that the Petitioner was insane, that the evidence shows and establishes that his "sanity" cannot be restored, that he must, therefore, be considered as having been committed for the rest of his life, without conviction of any crime, in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States. (Ap. pp. 8-10)

Following the overruling of the motion for new trial, (A. pp. 10-11) the transcript of the record and assignment of errors was duly filed with the Clerk of the Supreme Court of Indiana, in which assignment of errors Petitioner, by counsel, contended that the trial court had erred in overruling the motion for new trial. (R. 1A, both Transcripts)

In Petitioner's briefs his counsel duly contended, with appropriate citations, that without mental capacity there is no criminal intent, that without criminal intent there is no

crime, that the Petitioner, being incapable of understanding the nature of the charges brought against him and unable to "recover" his "sanity" has been sentenced to life imprisonment, in violation of Article 1, Section 12 of the Constitution of Indiana, and the Eighth and Fourteenth Amendments of the Constitution of the United States.

The Supreme Court of Indiana, in its opinion affirming the order of commitment, (A. pp. 23-27) held that the Petitioner had not been denied due process of law, did not mention Appellant's contention in respect to the Eighth Amendment of the Constitution of the United States, but did hold that as to the imprisonment for life, the legislature under its police power may provide for the safety, health, and general welfare, including the confinement, care and treatment of the mentally defective, retarded or insane.

The dissenting opinion of Justice DeBruler, filed at the same time (A. pp. 29-31) points out that the Petitioner cannot be committed under the state statute in question because the purpose of the commitment, to provide for treatment and trial in the future, cannot be accomplished, that the confinement of Petitioner for life on the basis of the existence of criminal charges against him, unproven, is in violation of the due process clause of the 14th Amendment to the United States Constitution, as well as the equal protection clause of that Amendment.

Petitioner duly reiterated the same contentions of violation of the Eighth and Fourteenth Amendments of the Constitution of the United States in his Petition For Rehearing duly filed following the decision of the Supreme Court of Indiana, which Petition For Rehearing was thereafter denied without opinion by the Supreme Court of Indiana. (A. p. 31)

SUMMARY OF ARGUMENT

The Petitioner, a deaf mute having a mental age of three or four, with almost an entire lack of communication with the society in which he lived, lacked specific knowledge and comprehension of the nature and consequences of the criminal acts with which he was charged, was incapable of committing a crime, has not been convicted of any crime, is unable to understand the nature of the charges brought against him, is unable to "recover" his "sanity", but has been sentenced to life imprisonment. This constitutes cruel and unusual punishment, in violation of the Eighth Amendment of the Constitution of the United States; and further constitutes a denial by the State of Indiana of Petitioner's right to due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

ARGUMENT

I.

THE CONFINEMENT OF THE PETITIONER, A FEEBLE-MINDED DEAF MUTE, UNTIL HE HAS "BECOME SANE" AS A COMMITMENT UNDER TWO CRIMINAL CHARGES, (AS DISTINGUISHED FROM A CIVIL COMMITMENT), WITHOUT TRIAL THEREOF, AMOUNTS TO A LIFE SENTENCE RESULTING FROM THE MERE LODGING OF THE CRIMINAL CHARGES, AND CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

The uncontradicted evidence in the hearing held in the Marion Criminal Court, Division I, pursuant to the Acts of the General Assembly of Indiana, 1951, Ch. 238, Sec. 2, as amended, and as found in Burns Ind. Stat. Ann. 1956 Repl., (1969) Supp.), Sec. 9-1706a, set out hereinabove at pp. 3, 4 of this Brief, established that:

1. The Petitioner is mentally defective, and cannot understand the nature of the charges against him. (A. p. 13)

2. The Petitioner, in addition to mental defect, is a deaf mute. (A. p. 13)

3. The Petitioner does not have sufficient comprehension to understand the nature of the charges or to make his defense. (A. p. 14)

4. If you equate insanity with being unable to comprehend the nature of the charges and to assist his attorney in his defense, Petitioner's sanity could not be "restored." (A. p. 15)

5. The mental defect is what is referred to in the law as feeblemindedness, mental retardation. (A. p. 15)

6. Even if Petitioner were not a deaf mute, he would still lack the necessary comprehension. (A. p. 16)

7. Petitioner's mental comprehension is about that of a three or four year old deaf child. (A. p. 20)

If Petitioner were committed to the institution designed for treatment and care of the feebleminded, under a civil commitment pursuant to the provisions of the Acts of the General Assembly, of Indiana, 1939, Ch. 119, Sec. 3, as found in Burns Ind. Stat. Ann., 1964 Repl., Sec. 22-1907, set out hereinabove at p. 6 of this Brief, it would be upon certification by a reputable physician that he is *not insane*; and he would be eligible for discharge merely upon the determination of the superintendent that "the mental and physical condition of the (Petitioner) justifies it." Acts of 1919, Ch. 94, Sec. 18, as found in Burns (1964 Repl.), Sec. 22-1814 (set out hereinabove at p. 5 of this Brief) But obviously the commitment in this case, "until he shall become sane", is for life.

Without mental capacity there is no criminal intent, and without criminal intent there is no crime, *Fritz v. State of Indiana* (1912), 178 Ind. 463, 466, 99 N.E. 727, and it is not just a vague and general differentiation between right and wrong that indicates criminal responsibility, but rather specific knowledge and comprehension of the nature and consequences of the act with which the defendant is charged.

Flowers v. State of Indiana (1956), 236 Ind. 151, 163, 161; 139 N.E.2d 185. It is that comprehension that Petitioner, having a mental age of three or four, with almost an entire lack of communication with the society in which he lived, lacked. Being incapable of committing a crime, not having been convicted of any crime, being unable to understand the nature of the charges brought against him, and being unable to "recover" his "sanity", he has been sentenced for live imprisonment. Under such circumstances it is respectfully submitted that life imprisonment *is* punishment, cruel and unusual, in violation of the Eighth Amendment of the Constitution of the United States, *supra*, p. 2. *Weems v. United States* (1910) 217 U.S. 349; *Powell v. Texas* (1968) 392 U.S. 514; *Robinson v. California* (1962) 370 U.S. 660.

As pointed out in the dissenting opinion of Judge DeBruler, the statute under which the proceedings were held and the Petitioner committed clearly contemplates a *delay* in the trial or a *postponment*, implying that the commitment to a psychiatric institution is temporary and that trial will be held at a later date. (A. p. 30) The Supreme Judicial Court of Massachusetts has held that such a statute permitting confinement of a mentally ill petitioner who had been charged with crime but not tried, could only be sustained as a *non-penal* statute if the remedial aspect of confinement had foundation in fact, *Nason v. Superintendent of Bridgewater State Hospital* (1968). In the Supreme Judicial Court of Massachusetts, 233 N.E. 2d 908. It is clear in the case at bar that in respect to restoration to sanity the "remedial aspect of confinement" is non-existent, and therefore the effect of the commitment for life must be construed as penal, based on the existence of criminal charges rather than conviction of crime, and clearly cruel and unusual punishment.

As provided in the statute under which the Petitioner was committed, he cannot be released from confinement until he becomes "sane," and either the Superintendent of

the state psychiatric hospital certifies to the Court that he has become sane, or the Court has otherwise been "sufficiently advised of the defendant's restoration to sanity." (*supra*, p. 4) Rightly or wrongly, sanity has been and is treated as the equivalent of comprehension of the nature of the criminal action, the proceedings thereon, and comprehension sufficient to make and assist in the Petitioner's own defense. Thus a restoration to sanity can never be certified by the Superintendent of the hospital where Petitioner is confined for the rest of his life, and cannot be found to exist by the Court.

On the other hand a feeble-minded person civilly committed pursuant to law, *supra*, pp. 5 and 6, has already been certified as *not insane* as a condition precedent to his commitment, and may receive a furlough or discharge according to the rules and regulations of the Commissioners of Mental Health, subject to the requirement that he cannot be discharged from the Muscatatuck State School or the Fort Wayne State School until, in the judgment of the Superintendent, the "mental and physical condition of the patient justifies it."

When a feeble-minded person is discharged, upon the determination of the Superintendent that his mental and physical condition justifies his discharge, there are no requirements whatsoever that he report to the court or any other place, and no requirements whatsoever that a judicial determination be made upon his condition, nor judicial approval of the Superintendent's determination. There is likewise no requirement that his condition as to being feeble-minded has changed—whenever an application for re-admission to the School is made, a new certificate is all that is required, filled out by a physician, filed with the Court, and certified by the Clerk of the Court to the proper School, stating that the person is *still* feeble-minded, *not* insane, etc. Acts of 1947, Ch. 93, Sec. 1, as found in Burns Ind. Stat. Ann. 1964 Repl., Sec. 22-1910, I.C. 1971, 16-15-2-1, *supra*, p. 6. There is no Indiana authority that the pending criminal

charges against Petitioner would have been a bar to his commitment to Muscatatuck as a feeble-minded person; and if he had been so committed under the civil procedure it would reasonably be expected that the Prosecuting Attorney would have dismissed the charges, as a practical matter, although there is no statutory requirement that he do so. Since he was in fact committed as an insane person under Burns Sec. 9-1706a, *supra*, pp. 3, 4, the charges will remain against him until he recovers his sanity—which means until he dies.

Counsel respectfully submit that a reversal of this cause by this Court will provide ample justification for the dismissal of the absurd criminal charges against this person with a mental age of three (3) or four (4) year old child—a deaf mute child—which action, it is respectfully submitted, the trial Court should have recommended to the Prosecuting Attorney when that evidence was received in the hearing—and should have done on the Court's own motion if the Prosecuting Attorney refused to do so. The fact that there was no statutory precedent for such action was certainly not justification for using a statute designed for remedial procedure for the insane, securing their treatment while awaiting trial, to provide instead for the life imprisonment of this half-blind deaf mute with the mental age of three (3) or four (4).

II.

THE CONFINEMENT OF THE PETITIONER, A FEEBLE-MINDED DEAF MUTE, UNTIL HE HAS "BECOME SANE" AS A COMMITMENT UNDER TWO CRIMINAL CHARGES, CONFINING HIM FOR LIFE SOLELY BECAUSE HE HAS BEEN CHARGED WITH TWO CRIMES, FOR WHICH HE HAS NOT AND WILL NOT BE TRIED (AND AS TO WHICH CHARGES THERE HAS NOT EVEN BEEN ANY JUDICIAL DETERMINATION MADE THAT THE INCIDENTS OCCURRED, IN RESPECT TO PROBABLE CAUSE), AND WHICH HE WAS INCAPABLE OF COMMITTING, AS CRIMES, IS A VIOLATION BY THE STATE OF INDIANA OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

Without repeating herein the uncontradicted evidence in the mental hearing in the trial Court, *supra,* pp. 11, 12, we respectfully request herein that the same be noted under this point also.

The Petitioner, a man with the mental comprehension equal to that of a three or four year old child, who is also a deaf mute, has, because of the *existence* of two pending criminal *charges* against him, been committed to confinement for life. He does not have, and can not in the future have comprehension which is sufficient to make his defense to the criminal charges of robbery lodged against him. He is not insane, unless all feebleminded persons with a mental level of a three or four year old child are insane. In addition to his admitted mental deficiency he is deaf and unable to speak. It does not seem possible in this day and age, but this man without communication and with the brain of a small child has been sentenced to life imprisonment. As pointed out above at p. 12, he is incapable of committing a criminal act, as such, and if the State of Indiana did indeed commit him for treatment and care as a feebleminded person (with certification that he is not insane), he would be eligible for discharge merely upon the determination of the superintendent that "the mental and physical condition

of the [Petitioner] jusitifies it." Acts of 1919, Ch. 94, Sec. 18, as found in *Burns* (1964 Repl.), Sec. 22-1814 (set out hereinabove at p. 5 of this Brief.)

It is respectfully submitted that as a matter of due process of law, under the Fourteenth Amendment of the Constitution of the United States, when it was established without contradiction that the Petitioner lacked comprehension, was feebleminded, had the mental capacity of a three or four year old deaf child, and was obviously therefore not criminally responsible for his acts, the State of Indiana should have been required to dismiss the criminal charges against the Petitioner, and commence proceedings for his commitment as a feebleminded patient to the appropriate State institution. There was at no time a judicial determination of probable cause, but it is obvious that no supportable determination of probable cause could have been made, since the Petitioner was incapable of committing a crime. There was simply no basis for the continuation of criminal charges against the Petitioner, any more than such charges could have been maintained against a defendant found to be only four years old. The commitment of Petitioner for life is neither fair nor just, and he has been deprived of due process and due course of law, and denied justice, to which he is entitled without denial, speedily, and without delay. Fourteenth Amendment of the Constitution of the United States; Article 1, Sec. 12, Constitution of the State of Indiana.

As stated by Justice DeBruler, in his dissenting opinion: (A., pp. 30, 31) (255 N.E.2d 518, 519)

> "Clearly, the real basis for this commitment is the existence of the criminal charges against appellant. This is shown by the fact that if those charges were to be dismissed because another person confessed and plead guilty to those crimes, or the complainant admitted he had lied in making the charges, the commitment of appellant under Burns Sec. 9-1706(a) *supra,* would obviously be ended. Thus the existence of *unproved criminal charges* operates to keep appel-

> lant confined in a state institution for life. This is a blatant violation of the due process clause of the 14th Amendment to the United States Constitution. For a case interpreting the federal statutes on this point see U.S. v. Curry (1969), 410 F.2d 1372.
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> * * *
>
> There is no rational basis for treating appellant differently than another person who is to be civilly committed. The existence of criminal charges against appellant is not a rational basis for such a discrimination. *Buxtrom v. Herold* (1966), 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed. 2d 620; *U.S. ex rel. Schuster v. Herold* (1969), 410 F.2d 1071."

In the case of *Nason v. Superintendent of Bridgewater State Hospital, supra,* p. 13, after the Supreme Judicial Court of Massachusetts had pointed out that a statute permitting confinement of a mentally ill person who had been charged with crime but not tried could only be sustained as a non-penal statute if the remedial aspect of confinement had foundation in fact, that Court further stated: (233 N.E.2d at 913)

> "Confinement of mentally ill persons, not found guilty of crime, without affording them reasonable treatment also raises serious questions of deprivation of liberty without due process of law."

In the case at bar, reasonable treatment, it is respectfully submitted, would include the opportunity for furlough and discharge that is available to persons, feeble-minded, who have been committed under the civil procedure, as patients, when their mental and physical condition justifies such furlough and discharge.

Except for the clearly-established mental deficiency which, in the opinion of Counsel, rules out possible criminal liability, this deaf mute would be entitled to trial even though lack of communication would prevent the usually-required level of comprehension of the proceedings, nature of the charges, and the comprehension necessary to assist in his

defense. *Klopfer v. North Carolina* (1967), 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed. 2d 1; *The People ex rel. Myers, on behalf of Lang v. Briggs, Director,* (1970) 46 Ill. 2d 281, 263 N.E. 2d 109.

CONCLUSION

The Petitioner, by his undersigned counsel, respectfully submits that upon review of the judgment and opinion of the Supreme Court of Indiana, the same should be held in violation of the Eighth and the Fourteenth Amendments of the Constitution of the United States, and that upon reversal of the judgment, the State of Indiana be required to dismiss the criminal charges after adequate and reasonable opportunity has been afforded to secure the civil commitment of the Petitioner as a feeble-minded person under the laws of the State of Indiana.

Respectfully submitted,

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